IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

JACOB P. SHULMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York, except such as was expressed orally at the conclusion of the preliminary hearing (490-501).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on March ~~10th~~ 24th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended by petitioner to urge all the errors assigned (3154-3194), unless limited by this Court, including the following:

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of petitioner, was a violation of petitioner's rights under the Fourth Amendment.

2. The use of a detectaphone in an office adjoining that of petitioner for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollection prior to testifying.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

ARGUMENT.

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated thorugh a trespass and illegal entry upon the premises of petitioner, was a violation of petitioner's rights under the Fourth Amendment.

The outstanding factual features with respect to the installation of the two microphones by the Government agents are these, and all of them are undisputed:

That the transaction commenced with a trespass and unauthorized entry upon petitioner's premises; that wires were illegally placed in his office for use in conjunction with the first microphone; that the placing of the first microphone and the second microphone (the detectaphone) constituted a simultaneous installation (315); that the testing of the first microphone—the allegedly discarded method—was effected by a trespass (288-289); that both methods of listening were tested and compared with a view towards utilizing the more efficient (313); that the trespass enabled the agents to ascertain the layout and the location of the desk, so as to facilitate the eventual listening (272-273, 337-338, 345-346); that the stenographer who assisted the Government agents listened through both microphones to determine which was better (480-482); and that the installation of both microphones was deemed a single job (402).

In this situation the differentiation between the two microphones by reason of the agents' insistence that they did their ultimate listening through the second, appears to be lacking in substance. In placing the detectaphone that the agents declared they finally used, they obviously and necessarily availed themselves of the information as to location of petitioner's desk and his telephone they acquired by virtue of their unlawful trespass upon the premises to which their listening was directed. The dis-

tinction thus introduced is a nicety that has no warrant in law and tends towards an improper abridgment of constitutional right. *Gouled* v. *United States,* 255 U. S. 298; *Weeks* v. *United States,* 235 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616.

2. The use of a detectaphone in an office adjoining that of petitioner for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

This point raises the important question of whether the use of a detectaphone, wholly apart from the original trespass, constituted an invasion of the right of personal security and private property. This Court indicated, in *Boyd* v. *United States,* 116 U. S. 616, that the protection against unreasonable searches is not limited to a physical breaking of doors and rummaging of drawers. Likewise, in *Nardone* v. *United States,* 308 U. S. 338, the Court declared that it outlawed evidence obtained in certain fashions because "inconsistent with ethical standards and destructive of personal liberty." The dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U. S. 438, which are believed by many scholars to declare the present state of the law, clearly contemplated the utilization of new scientific means for the invasion of privacy. It is submitted that the devices employed herein were such as to come within the condemnation of constitutional principle. An analysis of the listening process establishes that the Government agents were using instruments that enabled them surreptitiously to commit a trespass upon the voices of the participants in the conversation.

It should also be noted in this connection that eavesdropping is a criminal offense under the laws of New York (Penal Law, Sec. 721).

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

A careful reading of the Federal Communications Act, Sec. 605, shows that, so far as pertinent herein, it forbids a person not authorized by the sender to intercept any communication and divulge its existence or contents. This Court has declared the statute applicable to both interstate and intrastate conversations (*Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321). Moreover, the Circuit Court of Appeals, Second Circuit, has properly ruled that even the consent of one of the parties to a telephone conversation is not sufficient warrant for its reception in evidence. *United States* v. *Polakoff,* 112 F. (2d) 888, cert. den. 3 U. S. Law Week 3096.

In the instant case the Government argued below that there was no interception because the conversation was heard before it was transformed into electrical impulses; the point was also made that the words spoken, when listened to, had not yet acquired the character of a telephone communication (respondent's brief below, p. 19). Petitioner herein contends that the argument advanced by respondent is altogether untenable. The essence of the statutory offense is an interception and divulgence without authorization by the sender. The statute in this connection refers neither to telephone wires nor to any contact therewith. It is not even necessary that the offender be aware of the entire communication, for he violates the law when he does so much as reveals without authorization the existence of the message.

The very circumstance that the same single sentence of the statute embraces both messages transmitted by wire and also those transmitted by radio is strongly indicative that no limitation or qualification whatsoever is placed upon the means or instrumentality employed to accomplish an inhibited interception. Obviously the interception of radio message does not necessitate any physical contact with the appurtenances of broadcasting or transmitting. The electrical impulses are transmitted through the air or through other substances and any appropriate receiving apparatus can reproduce them. In order to render the words or signals audible the receiving set is generally equipped with means of amplification. In this sense the radio impulses are in every manner legally comparable to sound waves of the human voice, which can also be gathered or detected by microphones and amplified to facilitate listening.

The suggestion that the words spoken in the instant case had not yet acquired the character of telephone communications is absurd. Once the speaker uttered them with the intent that they constitute a telephonic transmission, the protective force of the statute became operative, and no unauthorized person might thereafter divulge what he had managed to overhear as part of the conversation in question.

Had the Government agents, aware of the identity of any person to whom petitioner habitually telephoned, employed a detectaphone in the same fashion to listen in on the other end of the conversation, they thus could have reconstructed the entire conversation, and all without the consent of any party thereto. This would have been done without physical contact with any telephone apparatus or wire. In effect the intention of the illicit listeners and the results achieved by them would be identical with the products of ordinary wire-tapping. The statute makes no distinction at all between methods, and it is submitted that legal principle requires that no distinction be made.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollections prior to testifying.

In discussing the right of counsel who is cross-examining a witness to inspect papers used by the witness to refresh his recollection, the foremost American authority (Wigmore, 3rd Edition, Vol. 3, p. 111), declares that the right should apply to a memorandum consulted for refreshment before trial and not actually used by the witness while on the stand, for the risk of imposition and the need to safeguard are declared to be just as great. This principle is approved in *Kouba* v. *Horacek,* 53 Hun 636, 6 N. Y. S. 250; and *State* v. *Deslovers,* 40 R. I. 89, 100 Atl. 64, and was declared to be the law in *U. S.* v. *Socony Vacuum Oil Co.,* 7th Cir., 105 F. (2d) 809, 837 (reversed on other grounds, *U. S.* v. *Socony Vacuum Oil Co.,* 310 U. S. 150). In this connection petitioner submits that the dictum in *Lennon* v. *United States,* 20 F. (2d) 490, to the contrary is unsound, while the discussion relating to Grand Jury minutes in *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 231, *supra,* is inapplicable.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

The memoranda in question, as explained in the foregoing petition, were of the utmost importance to a determination of whether constitutional rights of defendants had been violated by the Government's agents' method of listening in on the conversation. The preliminary inquiry

was obstructed by the refusal to permit defense counsel to inspect the notes. The notes, made almost contemporaneously with the events to which they relate, would undoubtedly have shed light upon this significant preliminary question, especially in view of the demonstrated lack of candor of at least one of the witnesses (121-124). The serious inroad made by the trial Court on the investigation was contrary to the rules laid down in *Nardone* v. *United States,* 308 U. S. 338.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

JACOB P. SHULMAN.
By JEREMIAH T. MAHONEY,
Attorney for Jacob P. Shulman,
Petitioner.